

# Recent Developments in Alaska's Adverse Possession Law

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In 2003, the Alaska Legislature attempted to eliminate the ability of bad faith squatters to acquire title to land by significantly narrowing the circumstances under which a person can establish title to land by adverse possession.<sup>[1]</sup> Prior to 2003, good faith was not necessary: continuous, open and notorious, exclusive, and hostile possession of the land for at least 10 years was sufficient.<sup>[2]</sup> Effective July 18, 2003, the adverse possession rule was amended so that title only vests to a person who can also prove they had a good faith belief that their neighbor's land lies within the boundaries of land the adverse possessor already owns.

Three recent Alaska cases clarify when the 2003 changes to the law apply, the elements of adverse possession, and the presumption of permissive use that is often applied in adverse possession cases.

## When the 2003 Amendments Apply

In *Yuk v. Robertson*, decided on May 26, 2017, the Alaska Supreme Court cited a 2011 case and reaffirmed that the 2003 changes to the adverse possession law do not apply retroactively.<sup>[3]</sup> In *Prax v. Zalewski*, decided on August 11, 2017, the Alaska Supreme Court clarified that the 2003 changes to the law apply to claims where the period of possession began but did not fully vest before July 18, 2003.<sup>[4]</sup> In other words, if all of the requirements necessary to establish an adverse possession claim were not met before July 18, 2003, the good faith factor will apply. In late 2016, a Juneau Superior Court judge determined that the 2003 changes to the law do not apply to prescriptive easements.<sup>[5]</sup>

In *Yuk*, the previous version of the law applied because all of the elements of adverse possession were met before the 2003 law went into effect. There, the Robertsons purchased land in 1991. The yard was fenced and the Robertsons placed playground equipment in the fenced area. When the Yuks purchased the land next to the Robertsons in

2010, a survey revealed that the fenced area was in fact part of the Yuks' land. The Yuks filed a lawsuit to quiet title to the fenced area, and the Robertsons asserted adverse possession as an affirmative defense. The trial court granted summary judgment to the Robertsons, finding that they met all of the elements of adverse possession prior to 2003. The Supreme Court upheld that decision.

In *Prax*, Zalewski claimed she had title by adverse possession to a parking lot owned by her neighbors, the Praxes. The Praxes counterclaimed with a quiet title action. Zalewski purchased her lot in 1994 and immediately began using it on the mistaken assumption it was part of her land. However, in 2002, her exclusive use of the parking lot was interrupted when she permitted someone else to use the parking lot. This fact ultimately interrupted Zalewski's adverse possession claim so that the 10-year clock stopped and did not begin again until she began exclusively using the parking lot again in September 2002. Because the 10-year clock did not begin until 2002, her claim could not have fully vested before the enactment of the 2003 amendments, and therefore, the Supreme Court held that the 2003 amendments applied in Zalewski's case. The case was sent back to the trial court to decide if Zalewski could establish a good faith but mistaken belief that the parking lot was within her property boundary.

In *Loewen*, the Court concluded as a matter of law that the 2003 amendments do not apply to prescriptive easements. This conclusion is contrary to some practitioners' understanding of the law, and thus it is important to note that the Superior Court's decision in *Loewen* is not binding on other courts in the state.

## Elements of Adverse Possession

The Court in *Yuk* clarified two elements of adverse possession, exclusivity and hostility. Exclusivity generally requires the adverse possessor use the land like an average owner of similar land. It is a subjective standard, determined based on the character of the land. The Yuks argued that, because the land was subject to a municipal utility sewer easement, the Robertsons could not have used it exclusively. However, the Court found that the Robertsons established exclusivity by using the land as other landowners did in the subdivision—subject to a municipal utility easement.

With respect to hostility, the adverse possessor must act like an owner, without the true owner's permission. It is an objective standard that does not take into account a person's belief about who owns the disputed land. Although the Robertsons mistakenly believed the disputed land was theirs, they still were able to demonstrate hostility by the presence

of the fence, and by placing the playground equipment near the fence and actively using it in their daycare business. The Court emphasized the importance of the fence, stating, “[i]t is well recognized that a fence, as a matter of law, is ‘one of the strongest indications of adverse possession.’” [6]

## Presumption of Permissive Use

The Court’s hostility finding in Yuk was bolstered by the fact the Robertsons did not have permission from the real owner to use the land. Alaska courts often apply a “presumption of permissive use” in adverse possession cases, which requires the adverse possessor to prove they did not have permission to use the land and the real owner could have ejected them. The Robertsons overcame the presumption because they treated and used the land as their own at all times (which was reinforced by the presence of the fence), and because there was nothing in the record proving they had permission.

The Juneau Superior Court addressed the presumption of permissive use in Loewen in the context of a public prescriptive easement. A prescriptive easement is similar to adverse possession, except it is a limited right to use land, as opposed to possessing it or owning it. A prescriptive easement can be established by the general public or a private individual if it can be shown that the use was continuous, uninterrupted, adverse, open, and notorious for at least 10 years. The court in Loewen observed that Alaska courts have been reluctant to set aside the presumption, whether in adverse possession or prescriptive easement cases, where the use began permissively. In order to rebut the presumption where the use began permissively, the claimant must prove “a distinct and positive assertion of a right hostile to the owner of the property”. [7]

In Loewen, the disputed land was acquired by Robert David in 1960, who transferred it to Richard Folta in 1979. Mr. Folta subdivided the land into five parcels and conveyed two of those parcels to the Loewens, one in 2009 and the other in 2010. The Loewens’ parcels were at all times prior to their ownership used by the public to access a seasonal hooligan fishery. A dispute arose when the Loewens put up barriers to block the public from accessing the fishery.

When Mr. David owned the land, he gave the public permission to cross his land to access the fishery via a footpath located on the land. When Mr. Folta acquired the land in 1979, he never took steps to revoke that permission. Nonetheless, the court found the public’s use was not permissive because, in 1979, the State constructed a new bridge with a vehicle ramp to the fishery in a different location than the foot path. The

construction of the bridge and the ramp significantly changed the use of the easement. That, coupled with use of the new bridge and ramp for 37 years prior to the Loewens acquiring the land, was sufficient to overcome the presumption of permission.

## Conclusion

The circumstances under which a person can establish title to land by adverse possession in Alaska were significantly curtailed in 2003 by adding a good faith requirement. Recent Alaska cases clarify that a person who established all of the elements of adverse possession before July 18, 2003 is not subject to this narrower version of the law. At least one Alaska superior court judge has found that the 2003 law does not apply to prescriptive easements. The Court in Yuk explained that exclusivity can exist despite a public utility easement, so long as the adverse possessor used the land as other landowners did in the subdivision, i.e., subject to the easement. Yuk also showed the importance of a fence in an adverse possession claim, both in establishing hostility and overcoming the presumption of permissive use, and emphasized that an adverse possessor can mistakenly believe they own the disputed land without defeating hostility. Although not binding on other courts in the state, Loewen is an example of a case where the presumption of permissive use was rebutted despite the fact the initial use was permissive.

[1] Alaska Stat. § 09.10.030 (2017); Alaska Stat. § 09.45.052 (2017); 2003 Alaska Sess. Laws Ch. 147 (S.B. 93).

[2] In addition to the 10-year adverse possession rule, if a person has uninterrupted, adverse, and notorious possession of land for seven years under “color and claim of title” (i.e., the person in good faith possessed an instrument like a deed ostensibly (but not actually) passing title to the land in question), that person can establish new title to land (except against the government). The 2003 amendments did not change this seven-year “color and claim of title” rule.

[3] 397 P.3d 261, 264 (Alaska 2017) (citing *Cowan v. Yeisley*, 255 P.3d 966, 973 (Alaska 2011)).

[4] 400 P.3d 116, 119-121 (Alaska 2017).

[5] 1JU-13-00596CI (Alaska Super., Sept. 19, 2016).

[6] Yuk, 397 P.3d at 265.

[7] 1JU-13-00596CI (Alaska Super., Sept. 19, 2016) (citing Cowan, 255 P.3d at 974 (further citation omitted)).